

Approved 4/2/08

**TOWN OF CUSHING
PLANNING BOARD
Minutes of Meeting
March 5, 2008**

Board Present: Chairman Dan Remian, David Cobey, Bob Ellis, Evelyn Kalloch, Frank Muddle and CEO Scott Bickford

Absent: None

1. Call to Order: Chairman Remian called the meeting to order at 6:13 P.M. He reviewed the procedures by which the meeting would be conducted, took a roll call and declared a quorum present. The chairman then asked the Board to accept the agenda and its sequence.

ACTION: Mr. Cobey made a motion, seconded by Mrs. Kalloch, to accept the agenda as presented.
Carried 5-0-0

2. Approve the Minutes of 2/6/08: Mr. Muddle said he would like his statement, shown in quotes on Page 1, Item 2 of the 2/6/08 minutes, to be added to the minutes of the 1/2/08 minutes.

ACTION: Mr. Muddle made a motion, seconded by Mr. Remian, that the part in quotes on Page 1 be added to the January minutes as an addendum at the end.
Carried 5-0-0

Mr. Ellis said that in the 1st paragraph of Item 4 on Page 2 the 9th sentence should read, "Mr. Ellis said that in a prior meeting there had been correspondence with the DEP concerning discrepancies in the tree cover and septic plume issues."

ACTION: Mr. Muddle made a motion, seconded by Mrs. Kalloch, to approve the minutes as corrected.
Carried 5-0-0

3. Correspondence and Communications: The chairman noted a letter, dated 2/20/08, from attorney Edmond Bearor, in which he said the PB had acted in an "arbitrary and capricious manner" in denying the application for the Robbins Mountain Subdivision [RMS]. Mr. Bearor had asked the PB to reconsider its decision prior to 3/3/08. Mr. Remian read the letter into the record. He also read aloud his reply, dated 2/26/08, which notified Mr. Bearor that the request for reconsideration had been placed on the 3/5/08 PB agenda. In this letter Chairman Remian informed the attorney that the PB might reconsider the RMS application at that time and would be willing to review a new and complete application.

The chairman asked if other members had communications or correspondence for the record. Mrs. Kalloch read aloud an email received from Bonnie Miller. Mr. Ellis reported that he had received a voice mail message from James Tower asking for copies of the minutes. Mr. Ellis had not responded to this request because he knew the developer had issued a formal request to the town for the minutes. Mr. Cobey stated that Mr. Tower had called him today saying he had been unable to obtain copies of the minutes. Mr. Cobey had emailed the minutes to the developer today and told the Board it was very inappropriate that Mr. Tower had not received them much earlier, in response to his 2/11/08 request to the town. He stated that the 2/11/08 letter had been addressed to the chair of the Board of Selectmen and had been copied to PB members. Mr. Remian said the town secretary had received a call on the subject this morning and had asked the CEO to fax the minutes to Mr. Tower.

The chairman asked the members if they had a conflict or bias concerning any item on the agenda. He polled the members and they all answered in the negative. Mr. Remian asked that all questions and comments be directed to the chair.

4. Request by Attorney Edmond Bearor, Rudman & Winchell, Bangor, ME, to Reconsider the February 6, 2008 Decision of the Board on the Robbins Mountain Subdivision Application: Mr. Cobey distributed copies of comments and possible motions he had written concerning reconsideration. Mr. Ellis questioned the propriety of bringing pre-written motions to a meeting. Chairman Remian said it was permissible if they did not represent a

decision. Mr. Cobey commented that he thought only a fool would not prepare for a meeting such as this. He said the only reason to reconsider the Board's decision would be if the applicant had been denied due process. He felt there were only three reasons for denial that might prompt a review of the decision. Mr. Muddle suggested that the Board be polled on whether it was appropriate to reconsider; Mr. Ellis agreed. Mr. Cobey said he thought it should be reconsidered and the Board should look at the issues and decide if it would be appropriate. Mrs. Kalloch stated that she was not comfortable with motions made ahead of time, though it might be appropriate to discuss the three issues Mr. Cobey had listed; she remained comfortable with her previous decision. Mr. Muddle stated that the Board had no new information to consider in reconsideration. He said he had reviewed his stated reasons for denial and the Board still had no DEP storm water permit, the boundary dispute had not been resolved, the financial report was over a year old and current events (the auction of property contained in the RMS and the downward turn of the real estate market) indicated some possible cash flow concerns; therefore, he did not think the application deserved reconsideration. Mr. Ellis said that attorney Bearor had asked that the PB articulate the issues so the applicant could address them. Mr. Ellis said that unless the Board had a DEP permit he agreed with Mr. Muddle that there was no reason to reconsider. Mr. Ellis felt the Board had articulated the discrepancy between what had been submitted to the state and the town related to the storm water. He said he stood by his decision unless a storm water permit had subsequently been submitted. He said he would be open to reconsideration of the financial capacity submission because Mr. Tower had never been told why it was inadequate and exactly what the Board expected from him in order to review financial capacity again. Mr. Ellis concluded by saying that he felt both Mr. Tower and Mr. Cardon had shown evidence of right, title and interest to the disputed land and the Board should not be asked to determine the quality of those submissions, though the issue should be resolved before approval could be made in good conscience. Chairman Remian said he thought it would be fair to ask if the applicant or his representative had new evidence.

Mr. Cobey asked if the Board had given the applicant enough time to resolve the property line issue. He agreed that the Board had not given the applicant detail as to what it considered sufficient demonstration of financial capacity. Mr. Cobey suggested the applicant be given time to come up with those items, as well as the DEP permit, because he was not sure the Board had respected due process. Chairman Remian said the financial capacity submission was approved with the condition that it satisfy Subsection 11.1, which dealt with performance guarantees. Mr. Cobey said that 11.1 stated that the sale of some or all lots could be forbidden until all improvements were made. He said he had voted to accept the email from the bank because the amount of money needed to complete the project was small. Mr. Cobey felt that recent evidence suggested it would be wise to get more specific and detailed information. Mr. Ellis said he agreed with Mr. Cobey about financial capacity and due process considerations and he would be willing to consider new submissions. Mr. Remian said he felt the decision should be reconsidered only if there were new evidence.

ACTION: Mr. Muddle made a motion, seconded by Mr. Remian, that this not be reconsidered, based on no new evidence to us and based on the fact that in repeated minutes the DEP report had been promised.
Failed 2-3-0 (Mrs. Kalloch and Mr. Muddle voted in favor)

Edmond Bearor, attorney for Mr. Tower, introduced himself and said he was unsure of the process for tonight's meeting. He said the minutes detailed a long and arduous process and he had known the applicant for many years. He said Mr. Tower had not expected an up or down motion at the February meeting because he was still waiting for the DEP decision. Mr. Bearor said he had spoken with the DEP several times since that meeting and had been told the draft approval had been circulated. The second in command had apologized for how long the process had taken and Mr. Bearor said even Becky Maddox could not tell him what the holdup was. He asked that the PB postpone any final determination until it had the DEP decision, or to make it conditional.

Concerning the financial capacity information, Mr. Bearor said the minutes indicated none had been submitted for two years, but he asserted there had been a letter last June or July. Mr. Bearor stated that the recent auction had been a marketing tool undertaken because the developer was not sure he was getting enough exposure in his efforts to sell the lots and not because his investments were in trouble. He said Mr. Tower understood that he could not sell any lots until the infrastructure was complete. Mr. Bearor said the applicant could freshen the letter from the lender if that was what the Board wanted.

In reference to the abutter's property line, Mr. Bearor wanted to distribute handouts of excerpts, including proposed wording for a condition, from the MMA PB handbook. Mr. Cobey asked that these submissions be placed on the table for future reference. Mr. Bearor also wanted to pass out copies of a letter from attorney Wayne Crandall to James Hopkinson, who represented Mr. Cardon. Mr. Muddle said the boundary dispute just needed to be resolved

and the Board did not need to get into the particulars. Mr. Bearor said he recognized that the Board would not take any final action tonight and said Mr. Tower would provide whatever was needed.

Chairman Remian said the Board had been threatened in the last three meetings to proceed with a final vote. He said both Mr. Tower and his attorneys had said for two years that the DEP permit would be in hand within two days or a week. The chairman said the applicant had been warned that a forced final vote might not be in his favor. He added that the financial letter had consisted of one sentence without substance, followed by a letter agreeing to extend a \$9 million loan. Mr. Cobey said he had seen only the email from Machias Savings Bank. As regarded right, title and interest, Mr. Remian said four abutters had questioned the property lines at the public hearing; in fact, concerns had been raised as far back as November 2005. The chairman said he believed the PB was willing to accept a new application when everything was complete and, with the new subdivision regulations, it could be moved through in two meetings. He concluded by stating that promised submissions had repeatedly not been received.

Mr. Bearor said that Mr. Tower had envisioned the application being tabled, not denied, for the stated reasons. The attorney asked that the PB table the matter until a certain date that everyone would know was the final date for a decision. He said he was troubled that they were held hostage by the DEP's failure to respond. Mr. Bearor said Mr. Tower had not understood that the PB was questioning his financial capacity to complete the project. Mr. Muddle noted that the PB had not passed a motion to reconsider; in fact, the Board had passed a motion not to reconsider.

Mr. Remian asked why the applicant refused to submit a complete application under the new subdivision regulations. Mr. Bearor responded that Mr. Tower had been laboring under the old regulations and was entitled to have his application reviewed under them. The attorney said if the Board picked a date to wrap this up Mr. Tower would live with that. Mrs. Kalloch said Mr. Tower had helped the PB write the new regulations so he should know them. She reiterated that the Board had repeatedly asked for documents that were not forthcoming. Mr. Muddle noted that there had also been an attempt to significantly change the project by adding nine lots and suggested it could be put together in a new application as easily as it could be revamped.

Mr. Ellis said the by-laws required a motion to reconsider individual criteria be made by a member who had voted yea. He also stated that adding lots could not qualify as an amendment since only approved plans could be amended. Mr. Muddle asked if the Board would entertain a motion to table reconsideration to a time certain or until a DEP response was received. Mr. Bearor said he needed a reconsideration vote this night or would have to appeal before the next meeting. Mr. Cobey said the Board should not consider right, title and interest unless it had not given the applicant enough time to demonstrate it; if sufficient time had already been given, then it should not be reconsidered. Mr. Muddle felt the issue should be cleared up prior to approval or at least be a condition of such and Mr. Cobey agreed. Mr. Ellis said resolution of that dispute could change the whole plan. Mr. Remian said if the Board approved and there were a line problem, many lots would be affected. Mr. Cobey said a revised plan would then have to be submitted. The chairman said the Board had considered approval with a condition that the line be resolved before moving forward but had felt that would only muddy the situation.

MOTION: Mr. Cobey made a motion, seconded by Mr. Ellis, that the Board finds that it did not give the applicant time to demonstrate uncontested right, title and interest in the property by eliminating contradictory evidence and will provide the applicant time to do so by reconsidering the matter at its May meeting, for which evidence shall be submitted not less than 14 days prior.
Motion later withdrawn.

Mr. Ellis said the property line dispute had come with the application. People had questioned the border from the beginning but Mr. Cardone had provided documented submissions only on 12/5/07; Mr. Ellis said this had given the Board two months to consider this issue. Mr. Cobey said that the applicant had known this was a problem for over a year and had done nothing to resolve it. Mr. Remian said the November or December minutes of 2005 stated that Mr. Tower had said this issue would be resolved. Mr. Muddle said the Board should not get involved in this because it was between the two parties and it would not be possible to put a deadline on it. Mr. Cobey stated that an applicant was supposed to present clear evidence of right, title and interest. Mr. Muddle agreed, but said Mr. Crandall had said it did not concern the PB. He concluded that this issue would hang over the project until it was resolved.

CEO Bickford suggested the Board be cautious about the motion on the table because it had been pre-written and could open a battleground. He reminded the PB that their planning book had a burden of proof clause, which fell upon the applicant. Mr. Ellis asked the chairman if he had asked the PB attorney if pre-written motions were

permissible. Mr. Remian replied that the attorney had said they were OK if there was not a predetermination. Mr. Cobey said it was not in the PB's purview to give or not give the applicant time and he would vote against the motion. Mr. Ellis suggested that someone make another motion and the one on the table was withdrawn.

MOTION: Mr. Muddle made a motion that we reconsider this action of the Board at the May meeting, at which time we ask that evidence be submitted from the DEP on storm water management and an update to the financial information that's before us or by that date or prior to the meeting, a new application.
There was no second and the motion was not voted upon.

Mr. Ellis said the request for financial information should be specific and the DEP response should be an approval and the conflicting submissions addressed in regard to clearing.

MOTION: Mr. Cobey made a motion, seconded by Mr. Ellis, to reconsider the denial only on the issue of financial capacity and that we require the applicant to provide a bank letter committing to a loan for his estimated cost of construction for the project and that we consider it at the May meeting.
Motion later withdrawn.

Chairman Remian asked Mr. Bearor if he intended to file an appeal. The attorney replied that if the Board voted tonight to reconsider then an appeal could be stayed until May; if the Board voted to reconsider in May, then the appeal would have to go forward due to time restrictions connected to the original denial. Both Mr. Muddle and Mr. Ellis said that, in light of that, they would be willing to vote to reconsider. Chairman Remian said an appeal would be costly for both parties and a new application would be more appropriate. He noted that one problem with the application was that so many submittals had changed throughout the process that the Board may not really know on what it had voted. There was further discussion of reconsideration and possible conditions of approval. There was discussion about what a new motion should be. Mr. Remian and Mr. Ellis said they also wanted the DEP application to address the Board's concerns about the discrepancy between submittals to the town and the DEP concerning how much acreage would be cleared. Mr. Ellis clarified that he wanted the DEP approval to address the concerns of runoff in relation to the clearing.

MOTION: Mr. Cobey made a motion, seconded by Mr. Remian, to approve the plan for Robbins Mountain dated 11/21/07 for the property on the west side of Pleasant Point Road with the following conditions: 1) the PB receives an approved DEP storm water management plan addressing the concerns of runoff in relation to clearing of land, 2) the PB receives a bank letter committing to lend the amount of the applicant's construction estimate on this project, and 3) the applicant is able to demonstrate uncontested right, title and interest to his property with particular reference to its north boundary, together with any revisions in the plan that results in, for the the PB's review.
Motion later withdrawn.

Mr. Muddle said he felt the first and second items needed to be done before approval and he would approve only the third item as a condition. He said the Board had been cautioned about this by counsel and should not approve this motion. When asked why by Mr. Cobey, Mr. Muddle said since it had not been resolved in two years, there was nothing to say it would be in the next two. Mr. Ellis characterized Mr. Cobey's motion as offering a road for progress while the alternative offered a road to court. Mr. Cobey stated that the applicant was entitled to be considered under the original regulations and the Board had no business strong-arming him to make a new application.

The CEO asked Mr. Cobey if he had a figure for the construction costs. Mr. Remian replied that the application noted they were \$125,000. Mr. Bickford asked if it would simplify things if the Board simply voted to reconsider the review criteria to give the applicant time to submit any additional materials he liked. Mr. Remian said that would open up the whole application. There was discussion about repercussions of certain decisions or motions. Mrs. Kalloch said the construction costs in the 2-year old application might no longer be realistic. Mr. Bearor asked if the Board would like the applicant to refresh the figure. Mr. Cobey said yes and commented that the estimate supplied to the DEP was over \$200,000.

MOTION: Mr. Muddle made a motion that we reconsider our action of the February meeting to disapprove this project and we will reconsider that and look for sufficient information for this review.
No second was made and the motion was withdrawn.

Mr. Tower explained that the discrepancy between the construction figures in the applications to the town and to the DEP had resulted from the stockpiling of materials for the road in the interim. He said he had more than sufficient materials to build the road, so the cost to do so had diminished. He then said that some of his attempt at innovative marketing had created doubts and suspicions among the townspeople. The auction had not been successful because the potential buyers had thought they smelled blood in the water. He said that all offers had been rejected and it had not affected his financial standing. He explained that he had one large block of financing for five subdivisions, including the four in Cushing, which contained funds to build the road in RMS. The developer said he was a very private person and was not comfortable discussing his finances in public, though he acknowledged that there were times when it was necessary to reveal more than he wished. He stated that the Subdivision Regulations offered four choices and he would agree with the condition not to sell any lots until all infrastructure was in place and he hoped the Board would focus on that.

ACTION: Mr. Ellis made a motion, seconded by Mr. Cobey, that we reconsider our February denial and table this application until our regularly scheduled May meeting.
Carried 4-1-0 (Mr. Remian voted against)

5. Adjournment:

ACTION: Mr. Muddle made a motion, seconded by Mr. Ellis, to adjourn at 8:04 P.M.
Carried 5-0-0

Respectfully submitted,

Deborah E. Sealey
Recording Secretary